FILED
DEC 8 1919
JAMES D. MAHER,
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In the

Supreme Court of the United States

October Term. 1919.

No. 330.

PENNSYLVANIA GAS COMPANY,
Plaintiff in Error,

v.

PUBLIC SERVICE COMMISSION, Second District, of the State of New York, the City of Jamestown, New York, et. al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

MARION H. FISHER
and
JOHN E. MULLIN,
For Plaintiff in Error.

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POINT I.

The question of the propriety of the writ of prohibition, sought to be raised by point I. of the brief on behalf of the city of Jamestown, and Point IV. of the brief on behalf of the Public Service Commission, Second District, State of New York, defendants in error, is not an open one.

It is settled that a judgment of the highest court of a state finally disposing of a writ of prohibition is reviewable by this court on writ of error, although such judgment did not determine the merits of the principal suit.

> Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30, 60 L. ed. 507.
>
> Weston v. Charleston, 2 Peters, 449, 7 L. ed. 481.

The same considerations here urged by defendants in error on this subject were urged before Justice Hasbrouck on the argument at special term of the supreme court of the state of New York, who held the writ was available before trial on the merits (printed record, 45), and granted it. The defendants in error raised the same question before the appellate division and the court of appeals, and it was disregarded by both courts.

It is settled law in New York, as well as in other states, that a writ of prohibition may issue to a public service commission which is proceeding in a matter over which it has no jurisdiction, although the right to review the commission's action by certiorari exists.

> "Prohibition is the proper remedy against a Public Service Commission assuming to act in a case not within its jurisdiction."
>
> Quinby v. Public Service Commission, 2nd Dis., N. Y., 223 N. Y. 244, 119 N. E. 433, P. U. R. 1918D, 30.

Huntingdon Chamber of Commerce v. Public Service Commission (W. Va. Ct. of App.),——W. Va.——, 99 S. E. 285, P. U. R. 1919D, 968.

Atchison, Topeka & Santa Fe R. R. Co. v. Corporation Commission (Okla. Sup. Ct.),——Okla. ——, 170 Pac. 1156, P. U. R. 1918C, 598.

Questions of local practice determined by state courts are not open for review in this court.

Bi-Metallic Investment Co. v. State Board, 239 U. S. 441, 60 L. ed. 372.

Chicago R. I. & P. R. Co. v. Whiteaker, 239 U. S. 421, 60 L. ed. 360.

Perryman v. Woodward, 238 U. S. 148, 152, 59 L. ed. 1242, 1244.

POINT II.

The protection of interstate commerce from state regulation afforded by the commerce clause is not limited to common carriers, as implied in the brief on behalf of the Public Service Commission, Second District, State of New York.

International Paper Company v. Massachusetts, 246 U. S. 135, 142, 64 L. ed. 624, 629.

Looney v. Crane Co., 245 U. S. 178, 62 L. ed. 230.

Text Book Co. Case, 217 U. S. 91, 54 L. ed. 678.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719.

See also cases cited at pages 16-17 of principal brief of plaintiff in error on original package doctrine.

This case involves an interpretation of the Constitution, not of the Interstate Commerce Acts. Therefore, the fact that plaintiff in error is not a common carrier is not pertinent.

POINT III.

The finding of the court of appeals that, "there is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. * * * It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end until the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by the petitioner * * * the transmission is as continuous and rapid as science can make it,' " (printed record, 51), is a finding of fact, based on the evidence (the pleadings) and is conclusive.

Interstate Amusement Company v. Albert, 239 U. S. 560, 60 L. ed. 439.

German Savings and Loan Society v. Dormitzer, 192 U. S. 125, 48 L. ed. 373.

Minneapolis, St. Louis R. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed, 614.

Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281 at 288, 54 L. ed. 1042, 1044.

POINT IV.

Even if the determination by the court of appeals that the transaction in its entirety is interstate commerce should be regarded as a conclusion of law instead of a finding of fact, we submit that it is a conclusion necessarily resulting from the finding of fact by the court of appeals, as stated in Point III, supra.

The contention of counsel for the defendants in error that the conclusion of the court of appeals that the busi-

ness of the plaintiff in error, including the delivery of the gas to the consumers, is interstate commerce, is erroneous, is not based on any claim that such conclusion does not necessarily follow from the facts found by the court of appeals, as above set forth. On the contrary, it impliedly recognizes that the conclusion necessarily results from the facts as so determined, and they seek to avoid the effect thereof by setting up a different statement of the facts, claiming that there is stoppage and storage in transit, that the destination of the gas is Jamestown, and not the consumers, that the gas is sold as called for, etc. (see brief on behalf of the city of Jamestown, pages 14, 18-19, 26, 31), which is directly contrary to the finding of the court of appeals. While the brief on behalf of the Public Service Commission, Second District, State of New York, does not expressly set up the same contention that is made on behalf of the city of Jamestown, it impliedly does so, by setting up facts different from those found by the court of appeals, and by reverting to the original package theory, which was expressly repudiated by the court of appeals (see brief on behalf of Public Service Commission, page 4-6).

Under the authority of the Foster case (247 U. S. 105, 62 L. ed. 1006), it seems to us that the proposition stated in this point is beyond serious controversy.

POINT V.

The admission of defendants in error that the rates in this case may be regulated by Congress when it sees fit to do so is fatal to their contention that the business is not interstate commerce.

It is conceded by defendants in error that Congress may regulate the rates of the defendant in error involved in this case whenever it sees fit to do so (see brief on be-

half of city of Jamestown, page 7, and brief on behalf of Public Service Commission, page 44, printed record, 50). This is flatly inconsistent with their contention, especially with that made in the brief on behalf of the city of Jamestown, that the distribution of the gas is a purely local matter and constitutes no part of interstate commerce (see brief on behalf of the city of Jamestown, pages 18-19). If it were true as there contended that the delivery of the gas to consumers in Jamestown by the defendant in error is a purely local matter, constituting no part of interstate commerce, it would necessarily result that congress could not regulate its rates; because there is no pretense that the regulation of such rates would react upon and discriminate against any other interstate commerce over which congress did have control, as in the Shreveport Rate Case, infra, the Minnesota Rate Case, infra, the Illinois Rate Case, infra, and American Express Company v. South Dakota, infra.

Certain Cases cited by Defendants in Error distinguished.

But few of the cases cited by counsel for the defendants in error require special notice, and those only because, from the generality of the language quoted from or used in them, they are apt to be misleading.

Budd v. State of New York, 143 U. S. 517, 36 L. ed. 247.

This case involved the right of the state of New York to regulate charges for elevating grain. The service was performed wholly within the state of New York. The reference in the opinions of the courts in the case to the extent and character of the commerce in grain transported in interstate commerce and handled through elevators was merely for the purpose of showing the public character of the business, to sustain the proposition that it is subject to public control. There was no pretense in the case that the rates regulated paid for

anything done outside the state. There was no possibility of a conflict of regulations of different states affecting any part of the transaction regulated. It is clear from the following language of this court in that case that it is not an authority on the proposition that a state may make a rate which must pay for that part of an interstate service which is rendered outside the state:

> "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses in Munn v. Illinois. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state and other kindred laws." (L. ed. 256).

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

This case involved the power of the state to fix the charges of a warehouse doing business within the state. The case was much like the Budd case which followed it. There was no pretense that the rates involved paid for anything outside the state.

If a traveler from New York to San Francisco should, in Chicago, in the course of the journey, go by trolley car from one railrord station to another, no one would contend, in the absence of action by congress, that the state of Illinois could not prescribe the fare for such trolley ride. While he would be making an interstate trip, the ride in the trolley car of itself would not be interstate commerce. In principle, the charges regulated in the Budd and Munn cases have no more bearing on interstate commerce than would the fare for such trolley ride.

State ex rel. Bristow v. Landon, 100 Kansas 593, 165 Pac. 1111.

This case is a different aspect of the same case reported as State v. Flannelly, 96 Kan. 372, distinguished

at page 46 of principal brief of defendants in error. It merely reaffirms the ruling made in that case. While the decision is ostensibly based on the ground that the natural gas business is local, not national, in character, it should be borne in mind that in that case the gas was distributed to consumers by local companies to which it was delivered by the Kansas Natural Gas Company, which transported most of it from the state of Oklahoma, and that the gas brought in from Oklahoma was commingled with gas produced in Kansas.

It is significant also that while the court, in the original case, based its decision largely on the original package doctrine (152 Pac. Rep. 26), that theory was expressly abandoned in a subsequent aspect of the same litigation (Landon v. P. U. C., 242 Fed. 682), where it is said by the court:)

> "Counsel for the commission, however, have repudiated the original package idea, and in their brief state: 'There is no original package where the transportation is conducted by means of a pipeline. Gas so conducted is not susceptible of delivery in original package."

and that that theory does not reappear in the Bristow case. (Counsel for the commission in the Federal court also represented it in the state court.

It also appears from the earlier case that the court got its idea that the natural gas business is local, not national, in character from the case of Jamison v. Indiana Natural Gas & Oil Company, which is distinguished at page 45 of the original brief of plaintiff in error, and also based its judgment that the state has power to regulate the rates on the Ott case, which is also distinguished at page 45 of the original brief of plaintiff in error.

Peoples Natural Gas Company v. Public Service Commission, officially reported as Franke v. Johnstown Fuel Supply Company, 70 Pa. Sup. Ct. 446.

> "This is an appeal by the Peoples Natural Gas Company from an order of the Public Service Commission requiring the appellant to file its tariff and schedule of rates covering its service in supplying natural gas to the Johnstown Fuel Supply Compnny, a corporation engaged in the furnishing of natural gas in the city of Johnstown." (opinion of court, page 450).

The Peoples Natural Gas Company denied tnat the part of its busines involved in that case was a public service. A large part of the discussion of the superior court is devoted to showing that the company's business was a public service and, therefore, subject to public control. But aside from this consideration, the case, on its facts, is not like the case at bar. The Peoples Natural Gas Company was a Pennsylvania corporation. Part of its gas it produced in Pennsylvania, and part it obtained from another company at the West Virginia state line (page 458). The gas obtained from West Virginia, "after passing into the ownership and custody of the Peoples Natural Gas Comyany" was "mingled with the gas produced by it in Pennsylvania" (page 459). "It was not consigned from one state to a terminus in another. It was delivered into the containers of the appellant in the state of Pennsylvania and controlled by the latter in its distribution from place to place, ***and so mingled with the Pennsylvania gas that its identity as an imported product was entirely lost***". Of course, in accordance with numerous decisions of this court affecting goods shipped in interstate commerce, whenever gas from West Virginia became commingled with the general property of Pennsylvania, it became subject to the laws of Pennsylvania.

Fayette County Gas Company v. Public Service Commission, 70 Pa. Sup. Ct. 472.

This case has no more bearing on the case at bar than does Franke v. Johnstown Fuel Supply Company, supra, which it followed. The superior court states the distinction between the two as follows:

> "This is an appeal from an order of the Public Service Commission of Pennsylvania, and involves one of the questions considered in the decision in Louis Franke v. Johnstown Fuel Supply Company, etc., 70 Pa. Sup. Ct. 446. The distinction between the cases is that the Fayette County Gas Company is a corporation of the state of West Virginia, and ***is engaged in the production and supply of natural gas in Pennsylvania.***" (pages 472-473).

As the plaintiff in error produces no gas in New York, the Fayette case is not germane. There being in the case at bar no commingling of the gas from Pennsylvania with gas in New York, none of the decisions in these gas cases has any bearing on the case at bar. The ***dicta*** appearing in the opinions are of no importance.

Illinois Central Railroad Co. v. Public Utilities Commission, 245 U. S. 493, 62 L. ed. 425.

The language quoted from this case at page 13 of the brief on behalf of the city of Jamestown, defendant in error, was not used with reference to the alleged power of the state to make regulations of interstate commerce, but of the power of the state to make regulations of intrastate commerce. The question in that case was the power of the Interstate Commerce Commission to make an order directing a change of intrastate rates prescribed by state authority, to remove a discrimination against interstate commerce. The question was substantially the same as in the Minnesota Rate Case. It was held that the order of the commission was too indefinite to be enforced. The same character of question was before this court in the Shreveport Rate Case, 234 U. S. 342, 58 L. ed. 1341, and American Express Company v. South Dakota, 244 U. S.

617, 61 L. ed. 1352, in both of which the state regulations of intrastate rates were set aside. Only those who lose sight of the facts before the court in the cases to which such language applies are mislead by the generality of the language.

Is not the statement justified that the court of appeals repudiated the ground on which the defendants in error seek to uphold the jurisdiction of the state in this case, and that counsel for the defendants in error now repudiate the theory on which the court of appeals sustained the state's power?

Respectfully submitted,

MARION H. FISHER,
JOHN E. MULLIN,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
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Defendants in Error

BRIEF FOR DEFENDANT PUBLIC SERVICE COMMISSION

[WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK]

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PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, CITY OF JAMESTOWN, NEW YORK, *et al.*
Defendants in Error

BRIEF FOR DEFENDANT PUBLIC SERVICE COMMISSION

POINT I

The decision of the Court in *Public Utilities Comm.* v. *Landon*, 249 U.S. 236, is conclusive unless the fact that the Pennsylvania Gas Company is a Foreign Corporation gives it a privilege in the State of New York which a Domestic Corporation engaged in the same service could not claim.

1 Counsel for the Public Service Commission will assume that the Court will commence in this case where it left off in the *Landon* case (249

U. S. 236). In that case Mr. Justice McReynolds said (p. 245):

'. . . in no proper sense can it be said, 'under the facts here disclosed, that sale and 'delivery of gas to their customers at burner-tips 'by the local companies operating under special 'franchises constituted any part of interstate 'commerce. The companies received supplies 'which had moved in such commerce and then 'disposed thereof at retail in due course of their 'own local business. Payment to the receivers 'of sums amounting to two-thirds of the product 'of these sales did not make them integral parts 'of their interstate business. In fact, they lacked 'authority to engage by agent or otherwise in 'the retail transactions carried on by the local 'companies. Interstate commerce is a practical 'conception and what falls within it must be 'determined upon consideration of established 'facts and known commercial methods. [Citing 'cases.] The thing which the receivers actually 'did was to deliver supplies to local companies. 'Exercising franchise rights, the latter distrib-'uted and sold the commodity so obtained upon 'their own account and paid the receivers what 'amounted to two-thirds of their receipts from 'customers. *Interstate movement ended when 'the gas passed into local mains.** The court 'below erroneously adopted the contrary view 'and upon it rested the conclusion that the Public 'Commissions were interfering with establish-'ment of compensatory rates by the receivers in 'violation of their rights under the Fourteenth 'Amendment.

'The challenged orders related directly to 'prices for gas at burner-tips and only indirectly 'to the receivers' business. They were under no 'compulsion to accept unremunerative prices; 'even the original supply contracts had not been 'adopted and were subject to rejection. [Citing

* Italics ours.

'case.] Our conclusion concerning relationship 'between the receivers and local companies ren- 'ders it unnecessary to discuss the effect of rates 'prescribed for the latter.'

The *Landon* case was a reversal of the companion insolvency receivership cases of *Landon* v. *Public Utilities Commission* [1916] 234 Fed. 152, *Landon* v. *Public Utilities Commission* [Apr. 1917] 242 Fed. 658, and *Landon* v. *Public Utilities Commission of Kansas* [Aug. 1917] 245 Fed. 950; and was in harmony with the decision of the Supreme Court of Kansas in *State ex rel.* v. *Flannelly* [1915] 96 Kan. 372, *S.C.* [1916] 96 Kan. 833, *State ex rel.* v. *Litchfield,* 97 Kan. 592, and *State ex rel.* v. *Gas. Co.* [1917] 100 Kan. 593, 596–597, involving the same corporations, and to the same effect as *Manufacturers' Heat & Light Co.* v. *Ott* [1914] 215 Fed. 940, 944–945, and *Pipe Line Cases* [1914] 234 U. S. 548, 561–562, 573, 575.

In addition to the Federal authorities referred to and the New York decision under review the same result has been reached in Maryland (*West Virginia & Maryland Gas Co.* v. *Towers* [March 1919] 106 Atl. 265) and in Pennsylvania (*Peoples Natural Gas Company* v. *Public Service Commission,* decided by Superior Court of Pennsylvania in October 1918 [Superior Court Opinion No. 55], and *Fayette County Gas Company* v. *Public Service Commission,* decided by the same court at the same time [Superior Court Opinion No. 54]).

In the Maryland case two natural gas corporations were plaintiffs, each with the name West Virginia & Maryland Gas Company, one organized under the laws of West Virginia and one under the laws of Maryland, the West Virginia corpora-

tion being engaged in the production of natural gas which it sold to the Maryland corporation, which transported it from the point of delivery in West Virginia across the state line and distributed it to its various patrons in the city of Cumberland and other points in Allegany county, Maryland. The claim was made that the business of the latter company was not only interstate but that its interstate character controlled its entire service, and hence that it was thereby exempted from the control of the Maryland Public Service Commission. The Maryland Court of Appeals rejected the claim and held that the plaintiff natural gas corporations were as to their local public service under the control of the state commission.

The Pennsylvania cases referred to present different phases of the subject-matter, but are to the same effect as the decision under review and the decision of the Maryland Court of Appeals.

2 The Court will observe that the Maryland Court of Appeals likened the subject-matter, as did the Kansas Supreme Court, to the principle illustrated by the " original package " cases. Of course if the original package decisions, especially the *Hardin* case (135 U. S. 100), were *just like* this case there would be an end of analogy and the only question left would be whether this Court would follow its decision made in 1890. It is submitted that the *Hardin* case is a great deal nearer an authority for than against the jurisdiction of the commission. If natural gas were brought to Jamestown in containers under pressure the *Hardin* case would be a direct authority that the Pennsylvania Gas Company might sell a container with its contents to a Jamestown householder, who

could turn a key and have the benefit of the gas the same as he turns on the gas now. And of course the same result would follow if title to the container remained in the Pennsylvania Gas Company and only the gas was sold, the container being sent back to the Pennsylvania well for another charge.

Here plainly we have the equivalent of the keg of beer in the *Hardin* case. It is manifest from the *Hardin* case that the beer keg with its protected contents would lose its immunity under Federal authority the moment it was set up on a bar and the contents drawn and delivered for consumption contrary to the prohibitory law of Iowa. Is there any doubt that the decision of the Court in the *Hardin* case would have been to the contrary if the Peoria brewery had been located on the eastern bank of the Mississippi and had laid its pipe under the river to connect with a faucet at the bar of the Iowa representative of the brewing company who had served or undertaken to serve his customers by the glass or "growler"?

When the gas brought in from Pennsylvania in mass reaches the service pipe of the individual householder it is separated from the mass and appropriated to the use of the individual consumer. The pressure in the transporting pipe line is vastly higher than in the distributing mains; it would be wholly impracticable for the householder to use it under the pressure which is necessary to convey it from the wells in Pennsylvania to the Jamestown distributing system. From the point where the pressure is reduced to the burner the whole business of distribution, measurement

and use is local, and from the junction of the private service pipes with the distributing mains the gas is separate and distinct from the mass, and from the gas on its way to other consumers in other service pipes, and never returns to or commingles with the gas in course of transportation.

Plaintiff in error is engaged in performing a public service at the city of Jamestown, the village of Falconer, and the town of Ellicott (p. 16) in all respects indistinguishable from that performed by domestic gas corporations, electrical corporations, water companies, etc., generally. The Pennsylvania Gas Company either produces or buys its gas in the state of Pennsylvania and transports it in its own pipe line to these places, where it distributes it to its consumers. It is no more a common carrier of natural gas than the Uncle Sam Oil Company (*Pipe Line Cases, supra,* 561–562, 575) was a common carrier of oil. It is no more a common carrier in interstate transportation than if it were engaged in manufacturing and distributing gas in Jamestown from coal mined by it in Pennsylvania and received in the usual manner by rail shipments across the state line; or, to approximate more closely, which it received over a privately owned railroad (not a common carrier) in coal cars exclusively employed in its service.

3. The conclusions arrived at by this Court in the *Landon* case and the Kansas Supreme Court in the *Flannelly* case are indeed but applications of the decision of the Court in *Munn* v. *Illinois* [1877] 94 U. S. 113, and the decision of the Court of Appeals of New York in *People v. Budd*

[1889] 117 N. Y. 1, affirmed by this Court in *Budd* v. *New York* [1892] 143 U. S. 517. *Munn* v. *Illinois* dealt with state regulation of interstate commerce, to wit, the elevation and storage of grain substantially all of which was destined for or in actual transportation to other states and much of it to foreign countries. In the minds of counsel who contested the legality of the Illinois statute the interstate commerce feature was deemed the strongest point and advanced first. Waite C.J. in speaking of the contentions of counsel said (p. 123):

'It is claimed that such a law is repugnant:
'1 To that part of section 8, article 1, of the 'Constitution of the United States which con- 'fers upon Congress the power "to regulate 'commerce with foreign nations and among the 'several states";
'2 To that part of section 9 of the same article 'which provides that "No preference shall be 'given by any regulation of commerce or revenue 'to the ports of one state over those of another"; 'and
'3 To that part of Amendment XIV which 'ordains that no state shall "Deprive any person 'of life, liberty or property, without due process 'of law, nor deny to any person within its juris- 'diction the equal protection of the laws."'

After considering and rejecting the last contention the Chief Justice proceeds (p. 135):

'We come now to consider the effect upon this 'statute of the power of Congress to regulate 'commerce.
'It was very properly said in the case of the '*State Tax on Railway Gross Receipts*, 15 Wall. '293, that "It is not everything that affects com- 'merce that amounts to a regulation of it, within 'the meaning of the Constitution." The ware-

'houses of these plaintiffs in error are situated
'and their business carried on exclusively within
'the limits of the state of Illinois. They are used
'as instruments by those engaged in state as well
'as those engaged in interstate commerce, but
'they are no more necessarily a part of commerce
'itself than the dray or the cart by which, but for
'them, grain would be transferred from one rail-
'road station to another. Incidentally they may
'become connected with interstate commerce, but
'not necessarily so. Their regulation is a thing
'of domestic concern and, certainly, until Con-
'gress acts in reference to their interstate rela-
'tions, the state may exercise all the powers of
'government over them, even though in so doing
'it may indirectly operate upon commerce out-
'side its immediate jurisdiction. We do not say
'that a case may not arise in which it will be
'found that a state, under the form of regulating
'its own affairs, has encroached upon the exclu-
'sive domain of Congress in respect to interstate
'commerce, but we do say that, upon the facts as
'they are presented to us in this record, that has
'not been done.'

Munn v. *Illinois* was decided ten years before the enactment of the Act to Regulate Commerce and twenty-nine years before the elevation and storage of grain was included within the jurisdiction of the Interstate Commerce Commission. (Act of Congress approved June 29, 1906.) If the legislation attacked in *Munn* v. *Illinois* had been enacted after the amendment to the Act to Regulate Commerce made in June 1906 undoubtedly the decision would have been the other way. The Illinois statute declared to be valid in *Munn* v. *Illinois* of course was superseded by the amendment to the Act to Regulate Commerce made in 1906.

The New York statute which was before the Court of Appeals in *People* v. *Budd* and before this Court in *Budd* v. *New York* was passed in 1888, the year following the original enactment of the Act to Regulate Commerce, and eighteen years before Congress subjected the elevation and storage of grain to the regulation of the Interstate Commerce Commission. All the grain affected by the statute of 1888 was moved or moving in interstate commerce, and unquestionably the statute of 1888 would have been void if enacted after the amendment to the Act to Regulate Commerce made in 1906. Blatchford J. speaking of the business of elevating grain at Buffalo said (pp. 532–533):

'that about 120,000,000 bushels of grain come 'annually to Buffalo from the West; that the 'business of elevating grain at Buffalo is con- 'nected mainly with lake and canal transporta- 'tion; that the grain received at New York in '1887 by way of the Erie Canal and Hudson 'River, during the season of canal navigation, 'exceeded 46,000,000 bushels, an amount very 'largely in excess of the grain received during 'the same period by rail and by river and coast- 'wise vessels; that the elevation of that grain 'from lake vessels to canal-boats takes place at 'Buffalo, where there are thirty or forty eleva- 'tors, stationary and floating; that a large pro- 'portion of the surplus cereals of the country 'passes through the elevators at Buffalo and 'finds its way through the Erie Canal and Hud- 'son River to the seaboard at New York, whence 'it is distributed to the markets of the world; 'that the business of elevating grain is an inci- 'dent to the business of transportation, the eleva- 'tors being indispensable instrumentalities in the 'business of the common carrier, and in a broad

'sense performing the work of carriers, being 'located upon or adjacent to the waters of the 'state, and transferring the cargoes of grain 'from the lake vessels to the canal-boats, or from 'the canal-boats to the ocean vessels, and thereby 'performing an essential service in transporta-'tion; that by their means the transportation of 'grain by water from the upper lakes to the sea-'board is rendered possible; that the business of 'elevating grain thus has a vital relation to com-'merce in one of its most important aspects; that 'every excessive charge made in the course of the 'transportation of grain is a tax upon commerce; 'that the public has a deep interest that no exor-'bitant charges shall be exacted at any point, 'upon the business of transportation; and that 'whatever impaired the usefulness of the Erie 'Canal as a highway of commerce involved the 'public interest.'

And at pp. 544–545:

'On the testimony in the cases before us the 'business of elevating grain is a business charged 'with a public interest, and those who carry it 'on occupy a relation to the community analo-'gous to that of common carriers. The elevator 'owner, in fact, retains the grain in his custody 'for an appreciable period of time, because he 'receives it into his custody, weighs it, and then 'discharges it, and his employment is thus analo-'gous to that of a warehouseman. In the actual 'state of the business the passage of the grain to 'the city of New York and other places on the 'seaboard would, without the use of elevators, 'be practically impossible. The elevator at Buf-'falo is a link in the chain of transportation to 'the seaboard, and the elevator in the harbor of 'New York is a like link in the transportation 'abroad by sea. The charges made by the eleva-'tor influence the price of grain at the point of 'destination on the seaboard, and that influence 'extends to the prices of grain at the places

'abroad to which it goes. The elevator is devoted 'by its owner, who engages in the business, to a 'use in which the public has an interest, and he 'must submit to be controlled by public legisla- 'tion for the common good. . . .

'So far as the statute in question is a regula- 'tion of commerce, it is a regulation of commerce 'only on the waters of the state of New York. 'It operates only within the limits of that state, 'and is no more obnoxious as a regulation of 'interstate commerce than was the statute of 'Illinois in respect to warehouses, in *Munn* v. '*Illinois*. It is of the same character with navi- 'gation laws in respect to navigation within the 'state, and laws regulating wharfage rates within 'the state, and other kindred laws.'

In *The Minnesota Rate Cases* [1912] 230 U. S. 352, 432, the Court examined the contention of the interstate carriers that the interblending of operations in the conduct of interstate and local business made it necessary that the state should surrender its control over domestic transportation rates. Mr. Justice Hughes, writing for the Court, said (pp. 432–433):

'But these considerations are for the practical 'judgment of Congress in determining the extent 'of the regulation necessary under existing con- 'ditions of transportation to conserve and pro- 'mote the interests of interstate commerce. If 'the situation has become such, by reason of the 'interblending of the interstate and intrastate 'operations of interstate carriers, that adequate 'regulation of their interstate rates cannot be 'maintained without imposing requirements with 'respect to their intrastate rates which substan- 'tially affect the former, it is for Congress to 'determine, within the limits of its constitutional 'authority over interstate commerce and its 'instruments the measure of the regulation it 'should supply. It is the function of this court

' to interpret and apply the law already enacted,
' but not under the guise of construction to pro-
' vide a more comprehensive scheme of regula-
' tion than Congress has decided upon. Nor, in
' the absence of Federal action, may we deny
' effect to the laws of the State enacted within
' the field which it is entitled to occupy until
' its authority is limited through the exertion
' by Congress of its paramount constitutional
' power.'

The same idea recurred in *Vandalia R. R.* v. *Public Service Comm.* [1916] 242 U. S. 255, 258–260, respecting the authority of the Railroad Commission of Indiana to prescribe electric headlights for locomotives in place of the oil headlights commonly in use. The commission's order was made in 1910 (p. 257), but Congress in 1915 (p. 259) passed an act giving the Interstate Commerce Commission powers of inspection and regulation broad enough to include locomotive headlights, and the question before the Court was whether this act operated *ex post facto* to vacate the commission's order and the judgment of the Indiana Supreme Court refusing to set it aside. In other words, the Court held that the Indiana Commission might prescribe electric headlights for all locomotives, whether engaged in interstate or intrastate commerce, until such time as Congress elected to delegate the authority to the Interstate Commerce Commission.

4 *Western Union Tel. Co.* v. *Foster* [1918] 247 U. S. 105, seems to be relied upon to the contrary of the foregoing. The Massachusetts Public Service Commission decided that the Gold and Stock Telegraph Company and the United Telegram Company had without just cause refused to supply one Foster the continuous quotations

of the New York Stock Exchange by means of a ticker service supplied to others, declared the refusal to be an unlawful discrimination, and required the two companies to remove the discrimination. Two suits were instituted, one a statutory petition by the telegraph companies to have the order of the public service commission annulled and the other a bill by the commission to have the same order enforced. The Massachusetts court held that the order of the commission was proper and rendered judgments accordingly. This Court reversed the judgments, holding that the order of the Massachusetts commission was void as beyond the jurisdiction of the state commission under the constitution and acts of Congress.

If the Act to Regulate Commerce had not included telegraph companies as common carriers in 1910 (§ 1 of the Act to Regulate Commerce as amended that year), and subjected their charges to the jurisdiction of the Interstate Commerce Commission (3rd paragraph of § 1, *ibid.*), and forbidden them to discriminate (§ 2, *ibid.*), or to subject any particular person to any undue or unreasonable preference or disadvantage in any respect whatsoever (§ 3, *ibid.*), the case might be considered an authority in support of the contention of plaintiff in error. But it is just as plain that the Act to Regulate Commerce includes the subject-matter of the controversies before the Court in the *Foster* case as it is that the subject-matter of this controversy has been excluded from the jurisdiction of the Interstate Commerce Commission by Act of Congress. Assume that the amendment of 1910 adding telegraphs, telephones

and cables to the jurisdiction of the Interstate Commerce Commission had carried the following clause, " except stock ticker and district fire alarm lines ": what would have been the decision of this Court in the *Foster* case?

POINT II

The Pennsylvania Gas Company is engaged in a public service at Jamestown, Falconer and Ellicott which is subject to the regulation of the State of New York, limited only by the Fourteenth Amendment of the Federal Constitution and the Bill of Rights embodied in the State Constitution.

1 It is significant that the exclusion from the jurisdiction of the Interstate Commerce Commission over common carriers " engaged in the transportation of oil or other commodity . . . by means of pipe lines " (Act to Regulate Commerce, § 1 [line 4]) is of a *group of carriers;* or of a *group of services,* to wit, transportation of water, transportation of artificial gas, transportation of natural gas. It is evident that the distributors and sellers of water and gas to cities and other municipalities and their inhabitants, and the services rendered by such distributors and sellers, are deliberately left where they were before the amendment of 1906 to the Act to Regulate Commerce. Such distributors and sellers are not common carriers anyway; but they are engaged in a public service, and when that service is rendered wholly within the state it is subject to the police power of the state. It may be admitted without detraction from the force of the contention that if Congress shall sometime in the future see fit to regulate the distribution and sale of natural gas which has been transported in

pipe lines across state boundaries it may do so; it is sufficient for the purposes of this case that it has clearly refrained from so doing.

The application here is for a writ of prohibition. Article 4 of the public service commissions law is entitled "Provisions Relating to Gas Corporations and Electrical Corporations; Regulation of Price of Gas and Electricity." Section 64 is —

'§ 64. *Application of article.* This article shall 'apply to the manufacture and furnishing of gas 'for light, heat or power and the furnishing of 'natural gas for light, heat or power, and the 'generation, furnishing and transmission of elec- 'tricity for light, heat or power.'

If the contention of plaintiff in error is sound it must follow that none of the commands of Article 4 addressed directly to gas corporations imposes any duty on the Pennsylvania Gas Company. A domestic gas corporation or a foreign corporation furnishing natural or artificial gas produced from wells located in the state, or from coal imported from Pennsylvania, is obliged by § 65(1) to

'furnish and provide such service, instrumentali- 'ties and facilities as shall be safe and adequate 'and in all respects just and reasonable. All 'charges made or demanded by any such gas 'corporation, electrical corporation or munici- 'pality for gas, electricity or any service ren- 'dered or to be rendered, shall be just and 'reasonable and not more than allowed by law or 'by order of the commission having jurisdiction. 'Every unjust or unreasonable charge made or 'demanded for gas, electricity or any such serv- 'ice, or in connection therewith, or in excess of 'that allowed by law or by the order of the com- 'mission is prohibited.'

None of these obligations is enforceable against plaintiff in error, according to its contention. It claims to be protected by the Federal Constitution in rendering an inadequate service, or in charging therefor whatever the traffic will bear — whatever in the judgment of its managers the traffic will bear. According to it, it and not the State of New York may determine the price of natural gas in Jamestown.

The contention of plaintiff in error in this respect is not supported by any authority except possibly the *Landon* cases reversed by this Court, and is opposed to the underlying principles developed in the *Munn* and *Budd* cases, already considered.

2 The powers of the legislature of the state of New York are plenary, except so far as they are limited by the Federal or State Constitution. (Cullen Ch.J. in *Saratoga Gas Case* [1908] 191 N. Y. 123, 134.) The 40,000 inhabitants of Jamestown (p. 22) look primarily to the State of New York — its courts, its legislature, its administrative tribunals like the public service commission — for the protection which is ordinarily found in the police powers inherent in the state.

Waite C.J. said in *Munn* v. *Illinois* (94 U. S. at p. 125) that —

'it has been customary in England from time 'immemorial, and in this country from its first 'colonization, to regulate ferries, common car-'riers, hackmen, bakers, millers, wharfingers, inn-'keepers, etc., and in so doing to fix a maximum 'of charge to be made for services rendered, 'accommodations furnished, and articles sold.'

Blatchford J. writing for the Supreme Court in *Budd* v. *New York* (143 U. S. at p. 535) quoted

with approval the foregoing language of Chief Justice Waite.

If the legislature of the state of New York should enact a statute fixing the weight and price of bread to be sold in cities containing upward of five million inhabitants it would be binding upon all New York bakers, whether domiciled in New York city or in the state without. (Waite C.J. in *Munn* v. *Illinois*, 94 U. S. at p. 129.) Could a Connecticut baker sell a smaller loaf at a larger price in the city because he made it in Connecticut and brought it with him, or because he shipped it over the New Haven Railroad?

It is conceivable that the New York legislature might enact a statute limiting the price of milk in the city of New York to twenty cents a quart. Could a New Jersey dairyman start a milk route and sell his product in the city at twenty-five cents a quart?

A resident of Pennsylvania may ship gold coin into the state of New York by express, but can he rely upon the interstate commerce clause of the Federal Constitution to protect him in lending it at more than six per cent interest in disregard of the New York statute against usury?

Jamestown is located about five miles from the Pennsylvania line (p. 22). Assume that a Pennsylvania corporation owned and operated a gas plant at Jamestown which manufactured gas from coal mined in and transported in interstate commerce from Pennsylvania. There is no doubt of course that the real estate, fixtures and personal property of such a corporation used in the manufacture and distribution of gas would be a " gas plant " as defined by § 2(10) of the public

service commissions law; nor any doubt that the foreign corporation which owned, operated and managed such a plant would be a " gas corporation " as defined by § 2(11) of the public service commissions law. But the contention of plaintiff in error would be that by removing the *manufacturing* part of its plant over the state line and converting coal into gas in Pennsylvania and sending it thence in pipes to Jamestown for distribution it could sell gas in Jamestown for any price it could get.

Such exemption from regulation is the opportunity of extortion and the identical evil " profiteering ".

With no control in the New York State Public Service Commission over the rates or service of the Pennsylvania Gas Company; with no control over its rates or service in the Public Service Commission of Pennsylvania; and with no control over its rates in the Interstate Commerce Commission on account of the negative provision of § 1 of the Act to Regulate Commerce, the Pennsylvania Gas Company is in a position to extort: at least it asserts here that the State of New York can neither by its legislature, nor its public service commission, nor its courts, prevent extortion, or discrimination, or preference.*

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* Under the contention of plaintiff in error all that any natural gas corporation, domestic or foreign, has to do to escape the regulation of its service charges by the State of New York is to tap the Pennsylvania gas reservior. But New York has natural gas too and a reciprocal arrangement might be entered into between a New York corporation and a Pennsylvania corporation to exchange gas, and thereupon each would pass automatically from the regulation of the commission of its own state and neither would incur the burden of regulation by the Interstate Commerce Commission. Upon the foundation of this reasoning there would be erected in Southwestern New York and Northwestern Pennsylvania a natural gas paradise, where the regulators would cease from troubling and the regulated would be at rest.

The next contention will be that the distribution in Western New York of electricity generated at the Horseshoe Falls in Canada is foreign commerce, and therefore not within the regulatory jurisdiction of the commission.*

POINT III

A Foreign corporation may not engage in a business in New York that is forbidden to a New York corporation; nor may it escape a regulation lawfully prescribed for a New York corporation.

Paul v. *Virginia* [1869] 8 Wall. 168
Horn Silver Mining Co. v. *New York* [1892] 143 U. S. 305, 314–315
General Corporation Law [of New York] §§ 15, 16
German-American Coffee Co. v. *Diehl* [1915] 216 N. Y. 57, 63–64, per Cardozo J.

In *Horn Silver Mining Co.* v. *New York, supra,* Field J. said, " It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In *German-American Coffee Co.* v. *Diehl, supra,* Cardozo J. said, "As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state, and transacts its business here, it must yield obedience to our laws."

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* See appendix to this brief.

POINT IV

A Writ of Prohibition will not lie in anticipation of the action of the Commission if the Commission has jurisdiction of the subject-matter and the only question is that of power to grant the particular relief prayed for.

Matter of Quinby v. *Public Service Comm.* [1918] 223 N. Y. 244, 254

The complaint to the commission was under § 71 of the public service commissions law. The hearing of the complaint and the duty of the commission respecting it are prescribed by § 72.

The Court will not assume in advance that the commission will either violate or ignore the statute, or disregard the interpretations of it by the courts; but if it should do so plaintiff in error would have an adequate remedy under the writ of certiorari. (*N.Y. Code Civ. Pro.* §§ 2120–2148a; *People ex rel. C. P. etc. R. R. Co.* v. *Willcox* [1909] 194 N. Y. 383, per Cullen Ch.J.)

Respectfully submitted

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[November 1919]

APPENDIX

In *Washington Water P. Co.* v. *Montana P. Co.* [1916] P.U.R. 1916E 144, 169–171, the Idaho Public Utilities Commission considered whether or not it was excluded by the commerce clause of the Federal Constitution from jurisdiction over the service and rates of an electrical corporation which received electrical energy at a point of delivery in Montana, brought it across the line between Montana and Idaho at 100,000 volts to a point in Idaho where it was stepped down to 16,500 volts, and in that form distributed it to various transformer stations adjacent to several mines where the current was again stepped down to 2300 volts, in which form it passed to the individual service wires of various mining companies, consumers of the transmitting-distributing company. While of course the administrative decision of a public service commission is not adjudication and therefore not a precedent for the guidance of courts, it is nevertheless submitted with respect that the recent opinion of the Idaho Commission is worthy of the consideration of the Court. The Commission says (p. 169):

'This Commission can see a wide distinction 'between transactions incident to the transmis- 'sion or transportation of a commodity of trade 'and commerce such as electrical energy from 'one state to another state, and transactions inci- 'dent to the distribution or retail delivery of such 'commodity within a state after having been 'transmitted from another state, as to such trans- 'actions being interstate commerce; and can see 'the force of complainant's argument with ref- 'erence to the state's recognized authority to

'prescribe local rules in certain cases affecting 'interstate commerce, until Congress shall act, 'when such argument is applied to the local dis-'tribution of electrical energy which has been 'transmitted from another state.

'It is not disputed by any of the parties to this 'proceeding that the transmission of electrical 'energy from a point in the state of Montana to 'the point of distribution in the state of Idaho is 'interstate commerce; and while the Supreme 'Court of the United States, as far as this Com-'mission is informed, has never decided this par-'ticular question, the Commission assumes that 'such transmission of electrical energy is a trans-'action of interstate commerce, but it does not 'follow therefrom that the distribution of such 'energy within the state of Idaho is a transaction 'of interstate commerce, although the regulation 'of such distribution may affect interstate com-'merce.

'The electrical energy which, after having been 'delivered to the distributor, is being distributed 'in Idaho to the users, has ceased to be an article 'of trade between Montana and Idaho, *regardless 'of whether the distributor is or is not the 'transmitter.** The electrical energy purchased 'in Montana and transmitted in bulk into Idaho 'is a subject of interstate commerce while it 'retains that character. The act of breaking up 'this energy by its owner for the purpose of dis-'tribution is not commerce in and of itself, but the 'sale of the broken up energy or the resale of the 'energy in its original form is commerce, and if 'such sale or resale is wholly within the state of 'Idaho, it is not interstate commerce.

'In the absence of any discrimination against 'electrical energy generated in or transmitted 'from another state, and in the absence of any 'action by Congress indicating that Federal

* Italics ours.

'supervision has been assumed, this Commission 'cannot see how the impartial state regulation of 'the distribution of such energy within the state 'can be repugnant to the provisions of the Fed- 'eral Constitution as affecting interstate com- 'merce in any essential or vital part, or as pre- 'venting or unreasonably burdening interstate 'commerce.

'The local distribution of electrical energy is 'peculiarly a subject of local concern, and is not 'a subject requiring uniformity of regulation as 'between states; and this Commission believes 'that the state has a right to enact reasonable 'laws governing such distribution within its bor- 'ders, in the absence of Federal control. When- 'ever Congress shall act so as to place the mat- 'ter under exclusive Federal control, the state, 'under the provisions of § 79 of the Public Utili- 'ties act, at once surrenders its right to regulate. 'The Commission assumes that Congress has not 'so acted.

'To hold that electrical energy generated in 'Montana or transmitted from Montana can by 'reason of that fact be distributed in Idaho for 'compensation without regulation, while the local 'distribution of electrical energy generated in 'Idaho is subjected to regulation, would be con- 'trary to public policy.'

In April of the present year the West Virginia Public Service Commission had before it the same question (*Re Appalachian Power Co.* P.U.R. 1919D 286). The Appalachian Power Company was a Virginia corporation lawfully engaged in the maintenance of hydro-electric and steam power plants for generating electricity for light, heat and power and supplying the same to the public in both states, and the question which the commission was compelled to decide was whether it had regulative power over the rates of the Vir-

ginia corporation in West Virginia. In its opinion the commission said (pp. 296, 298):

'It is by no means clear that the applicant 'merely by virtue of the fact that power ultimately distributed and sold to its consumers in 'West Virginia is generated in the state of Virginia and transported to its substations in West 'Virginia, to be there transformed, delivered, 'measured, and sold by means of its distributing 'system, to its West Virginia consumers, may be 'regarded as engaged in interstate commerce. '*McCluskey* v. *Marysville & N. R. Co.* 243 U. S. '36.

'We think it may be fairly said that the applicant's commerce, so far as its West Virginia consumers are concerned, begins when its electrical 'energy is transformed into commercial form and 'started on its way to be delivered, measured, and 'sold to its consumers. Or, in other words, that 'the current generated by the applicant is not 'consigned or started upon its journey for delivery to its consumers until it passes through applicant's substations in West Virginia; and if 'this be true, the transaction is wholly intrastate 'and the interstate relation between applicant 'and its consumers does not obtain. However, 'whether this interpretation of the character of 'the applicant's business is justified or not, we 'are of opinion, even though interstate commerce 'may be incidentally affected, the business of applicant being one of local concern only in so far 'as it pertains to its consumers in West Virginia, 'the same is the appropriate subject for state 'regulation. This position is supported by the 'opinion of the Supreme Court of the United 'States in the leading case of the *Minnesota Rate* '*Cases*, 230 U. S. 352. . . .

'So, it seems that by both reason and authority 'the business of the applicant in West Virginia 'should not remain unregulated, and that a rea-

'sonable regard for the public welfare and the 'mandate of the statute creating this commission 'requires that the jurisdiction there given should 'be exercised in order that adequate and suffi- 'cient service may be secured, reasonable rates 'prescribed, and unjust discrimination pre- 'vented.'

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

PENNSYLVANIA GAS COMPANY, *Plaintiff in Error,*

—against—

THE PUBLIC SERVICE COMMISSION, *Second District of the State of New York;* THE CITY OF JAMESTOWN, NEW YORK, *et al., Defendants in Error.*

No. 330

BRIEF FOR THE CITY OF JAMESTOWN, et al., DEFENDANTS IN ERROR.

STATEMENT

This is a writ of error to the Court of Appeals of the State of New York, bringing up for review a judgment of that court (record page 65) which affirms a judgment of the Supreme Court of that state, holding that the Plaintiff in Error was not entitled to a writ of prohibition restraining any further proceedings in a proceeding against the Plaintiff in Error before the Public Service Commission, Second District upon the complaint of Alfred C. Davis and others, seeking a review in the rates charged by the Plaintiff in Error, for gas furnished in the City of Jamestown, New York.

The history and circumstances giving rise to that application are as follows: On May 31, 1917, Alfred C. Davis and others, consumers of gas in Jamestown, New York, filed a petition with the Public Service Commission, Second

District, complaining of an increase in the rate of sale of gas. Such increase had shortly theretofore been made effective by the Plaintiff in Error, Pennsylvania Gas Company. On June 4, 1917, the Public Service Commission ordered that the Pennsylvania Gas Company either satisfy such complaint or answer. Thereupon and under date of June 23, 1917, the Plaintiff in Error filed a written demurrer to such complaint putting in issue the jurisdiction of the Public Service Commission over the subject matter involved in said complaint and over the Plaintiff in Error.

Later upon stipulation and order, the City of Jamestown, as such, was admitted as a party to the proceedings. The entire matter was then submitted to the Commission upon briefs and oral argument. Such submission was under date of August 23, 1917, and resulted in a decision of the Commission overruling the demurrer. Under date of September 19, 1919, the gas company made formal application for a re-hearing which was denied by the Commission September 27th.

Immediately the Plaintiff in Error made application for a writ of certiorari to review such determination and such writ was granted, returnable before the Appellate Division, Third Department. Upon the return of such writ of certiorari, such writ was dismissed as having been prematurely invoked (see opinion, *People ex rel Pennsylvania Gas Company vs. Public Service Commission,* 181 A. D. 147.)

On January 25, 1918, application for a writ of prohibition was noticed by the service of a petition and notice of application upon the attorneys for the Defendant in Error.

Hearing was had upon such application on February 2, 1918, before Hon. Gilbert D. B. Hasbrouck, at a Special Term of the Supreme Court held at the Court House in the City of Kingston, New York. Following such hearing, and on March 8, 1918, an order was made allowing an alternative writ of prohibition which required the Defendants

in Error to show cause at said Court on April 6, 1918, why such writ should not be made absolute. (In re Application Pennsylvania Gas Company 103 Misc. 37.)

Appeal was taken to the Appellate Division of the Third Department from said order and upon such appeal such order was reversed with an Opinion by said court written by Mr. Justice Lyon (In re Application Pennsylvania Gas Company 184 A. D. 556.) Upon further appeal by the Plaintiff in Error to the Court of Appeals of the State of New York, the decision of the Appellate Division was affirmed. (Pennsylvania Gas Company vs. Public Service Commission, 225 N. Y. 397).

A writ of error was then sued out by the Plaintiff in Error to the Supreme Court of the United States.

THE FEDERAL QUESTION

The question presented for review is whether under the Public Service Commissions Law of the State of New York (Laws of 1910 Ch. 480; Consolidated Laws of New York Ch. 48), the Public Service Commission, Second District of New York, has power and jurisdiction to control the rates of the Plaintiff in Error, Pennsylvania Gas Company, for natural gas produced by said company in the State of Pennsylvania and transported in pipes and then distributed and sold by it to consumers in the City of Jamestown, in the State of New York.

The facts are as follows: The Pennsylvania Gas Company is a corporation organized and existing under the laws of the State of Pennsylvania and engaged principally in the business of producing, transporting and marketing natural gas. The source of supply of such natural gas to such Pennsylvania Gas Company is wholly within the State of Pennsylvania. The Gas Company markets its natural gas product in part at least, within the State of New York, and among other places so served is the City of Jamestown.

Within that city the sole supply of natural gas to consumers is furnished by this company.

Jamestown is a city of approximately forty thousand inhabitants and is located in the southwesterly portion of the County of Chautauqua, State of New York, within approximately five miles of the boundary line between the States of Pennsylvania and New York.

Shortly before May 15, 1917, the Pennsylvania Gas Company filed with the Public Service Commission a new schedule of tariffs to become operative May 15, 1917. Such schedule so filed, increased the charge to consumers within the said City of Jamestown, sixteen and two-thirds per cent.

On May 31, 1917, Alfred C. Davis and others filed a complaint with the Public Service Commission complaining that since the organization of said Pennsylvania Gas Company and its commencement of supply of natural gas to consumers within the said City of Jamestown, that the returns to said company from their said consumers had been sufficient to aggregate many thousands of dollars annually, over and above the interest at legal rates, upon moneys invested; and that the said Pennsylvania Gas Company had upon many occasions increased its capital stock and distributed such increase among its stockholders in the form of stock dividends until its capital stock had increased to several times its original issue and all without further investment of moneys by its stockholders; that since its organization the Pennsylvania Gas Company had at all times and was at present paying to its stockholders cash dividends of at least ten per cent per annum upon the capital stock outstanding and that for a long term of years said gas company had paid to its stockholders large and excessive returns over and above a reasonable return upon capital actually invested, and over and above reasonable reservations for surplus and contingencies, and that all such payments and returns to stockholders had been made out of moneys

paid by the consumers for such natural gas prior to the attempt to increase the charges on May 15, 1917.

That the former charge to consumers in the City of Jamestown, was exorbitant, and that the said increase was unjust, excessive and wholly unnecessary and that such increase would result in great hardship to the consumers, customers and patrons of the said gas company within the city of Jamestown.

ARGUMENT

POINT I

A Writ of Prohibition does not lie in this case, in as much as there are other legal remedies, by Appeal or otherwise, for testing the jurisdiction of the Commission. In the proceeding before the Commission, full review of that question is permissible by Certiorari, following Final Decision upon the merits. Prohibition is never available, if other means for review exist.

Prohibition is one of the few Writs still known to our practice. It is a most extraordinary remedy, and can be invoked only upon jurisdictional questions, and can never be made a means of review:

Re New York and Porto Rico Steamship Co., 155 U. S. 524.
In Re Cooper, 143 U. S. 495.
Smith vs. Whitney, 116 U. S. 174.
In Re Rice, 155 U. S. 403.
City R. R. Co. vs. Cit. St. R. R. Co., 116 U. S. 563.

POINT II

The state statute expressly confers jurisdictio upon the Public Service Commission to regulat the selling price of natural gas sold within th State of New York.

By Section 71 of the Public Service Commissions Law of the State of New York, provision is made for the pre senting of complaints relative to prices charged by a supply ing gas corporation, and by Section 72, it is provided:

> "After a hearing and after such investigation * * the Commission, within lawful limits may, by orde fix the maximum price of gas or electricity * * * t be charged by such corporation or person * * * * *

It will be observed that this statute makes no distinctio in its terms between foreign and domestic corporations, no as to the source of supply. It declares generally such au thority in the Commission over persons and corporation "authorized to manufacture and sell the supply of gas o electricty." So far as we can discover, question has neve before been made as to the application of this statute t foreign corporations doing business within the state.

Upon this question, Justice Hasbrouck, at page 44 of th record concedes the scope of the state legislation and says

> "This power of the state has no limitation except i should be uniform and not confiscatory and not offen sive to the Interstate Commerce clause of the Consti tution."

The Court of Appeals has expressly held that the statut conferred jurisdiction upon the Commission. That cour in Pennsylvania Gas Company vs. Public Service Commis sion, 225 N. Y. 397, said in referring to the Public Servic Commissions Law:

"The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given a new "sanction" to "an inherent duty." (W. U. Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 416). It has established a new administrative agency the better to ascertain and declare and enforce a duty already existing. We cannot doubt that the creation of such an agency is within the power of the state until Congress shall manifest the purpose to override its action."

POINT III

The related powers of the Federal and State governments over questions of this character.

Under the Confederacy, preceding the adoption of the Constitution, chaotic conditions having ensued because of divers commerce regulations between the several states and citizens thereof, there was inserted in the Constitution of the United States, in subdivision 3 of Section 8 of Article 1, express declaration of the power of Congress, "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Pursuant to this power, Congress has adopted various statutory enactments generally referred to as the Interstate Commerce Acts. These enactments, however, relate almost entirely to transportation and from them, by express provision, are excepted, those persons and corporations engaged in the transportation of natural or artificial gas.

There is, then, no express statutory enactment by Congress touching the situation here presented. It may be that Congress has power to so enact under the above quoted provision of the Federal Constitution. It has not yet exercised that power.

It is, of course, true that transportation of gas, like that of any other commodity, from one state to another, is interstate commerce.

By the statutes, referred to under the preceding point, the State has attempted to delegate to this Commission, the power to fix these rates, and we have, squarely presented, question of the right of the State to so regulate these matters, in the absence of legislation by the Federal government.

Questions of this character have been before the courts for years.

In Gibbons vs. Ogden, 9 Wheat. 196, the power of Congress in interstate commerce matters was declared to be supreme and complete in itself, and that it had no other limitation than that fixed by the Constitution.

Early, however, it was recognized that, although the power of Congress to act was broad and practically unlimited, yet that there were numerous situations which must, of necessity, be regulated in some manner, and in those instances where Congress had not seen fit to exercise the power conferred upon it, by the Constitution, the States were permitted to assume regulation of those matters.

Thus, in Oil Mfg. Co. vs. Board of Agriculture, 222 U. S. 380, it was held that a state statute subjecting kerosene and other illuminating oils offered for sale in the State of North Carolina, to an inspection, for the purpose of determining their safety and value for illuminating purposes, and fixing a charge of half a cent a gallon for such inspection, was appropriate state legislation, and not an invasion of the province of Congress, Congress having failed to legislate in that particular.

It has also been held that the various states are entitled to protect their coasts, improve their harbors and streams, and to construct dams and bridges in navigable streams. within their limits, unless such action is in direct conflict with statutory enactments of Congress.

Wilson vs. Blackbird Car, Etc. Co., 2 Pet. 245.
Gilman vs. Philadelphia, 3 Wall. 713.
Pound vs. Turck, 95 U. S. 459.

The States may also, in connection with improvements, make a wharfage charge for the use of wharves and piers, although such are directly used in connection with interstate commerce, Congress having failed to act in that connection. Keokuk Etc. Co. vs. Keokuk, 95 U. S. 80.

These and numerous similar cases having continually been presented to our courts, the Supreme Court of the United States, in an exhaustive opinion by Justice Hughes in the Minnesota Rate Case (Simpson vs. Shepard, 230 U. S. 352, 57 L. Ed. 1511), reviewed all of these decisions and definitely and clearly indicated the provinces of both the Federal and State governments in matters relating to interstate commerce, where Congress had not seen fit to adopt any statutory enactments appropriate to the determination of such questions.

It was there held that the states could not impose direct burdens upon interstate commerce, and could not prohibit interstate trade in legitimate articles of commerce and after reviewing numerous decisions in that connection, the court there said:

> "But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate com-

merce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government, because of the necessity that they should not remain unregulated, and that their regulation should be adopted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope, without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concerns, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action.

> Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The Minnesota Rate Case presented a question of the validity of a statute seeking to confer upon a Utilities Commission regulative control over intrastate business handled by a carrier engaged in both intrastate and interstate business. It was urged that regulation in the manner sought, of the intrastate business necessarily had an effect upon, and did interfere with the conduct of the interstate business conducted by the same carrier. This case presents fuliy the confines of the decisions pro and con upon this question. Hence it is cited by most of the recent decisions as authority for the one contention or the other.

Its conclusion, however, makes it clear that it supports the contention of the respondents in the case at bar.

In reading it, it should be borne in mind that a railroad company sells nothing except transportation for persons or property. It does not sell a commodity. Hence, regulation in railroad cases becomes direct regulation of interstate transportation.

In *Missouri K. & T. R. Co., vs. Harris,* 234 U. S., 412, 58 L. Ed. 1378, the rule was enunciated that a state law, enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an Act of Congress regulating commerce, unless there is actual repugnancy, or unless Congress has at least mani-

fested a purpose to exercise its paramount authority over the subject.

In *Vandalia Railroad Company vs. Public Service Commission,* 242, U. S., 255, 61 L. Ed. 276, the court approved an Act requiring uniform equipment of headlights upon all trains operated within its confines, as ordered by the Commission, holding that inasmuch as Congress had not acted in the matter, there was no unconstitutional interference with Interstate Commerce.

As further illustrating the lengths to which the state may go in their regulation of interstate facilities engaged in interstate commerce as well as intrastate business, we call attention to the *Western Union Telegraph Company vs. City of Richmond,* 178 Fed. Rep. 310, Affirmed 249, U. S. 233. The Western Union Telegraph Company was incorporated under the general provisions of the Post Roads Law of the United States. That Act gives to telegraph companies complying with its requirements, the right to use public streets, highways and alleys without any consent of state or municipal authorities. The telegraph company was engaged in interstate commerce and was operating under such Act. Its line extended through the city of Richmond. That city by its ordinance, sought to control the size, number and location of the poles in the street, and to compel the right to attach its fire alarm wires to such poles and even to require underground conduits. It sought to enforce a payment of two dollars per year per pole for street purposes. The right to make such exactions was clearly held in that case, and determined to be not in conflict with the commerce clause of the Constitution.

As indicating the announced tendency of the court, we call attention to the decision in Illinois Central Railroad

Company vs. Public Utilities Commission, decided January 14, 1918, wherein, construing a statute, claimed to conflict with the constitutional provision, the court said:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supercede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested."

It will be observed that in its precise wording, the above quoted provision of the Federal Constitution, merely confers a power upon Congress. It does not purport to take like or similar powers from the states.

The above cases and many others to a like effect evidence a construction which preserves to the state the regulation of such incidental matters relating to interstate commerce, as have not been actually taken over to Congress. That is, until Congress acts, the State is free so to do.

This conception accords fully with the general doctrines enunciated by Mr. Justice Hughes in the Minnesota rate case and has been followed throughout the various decisions.

The case of *Western Union Telegraph Co. vs. Foster,* 38 S. Ct. 438, is clearly to be distinguished from this case in principle. In the Foster case, the bringing of market quotations from New York to Boston was preceded with a definite contract for the sale thereof. The quotations were sent to fill that contract.

In the case at bar, there is no definite contract for the sale of this commodity. It is brought from Pennsylvania,

turned into a system of distributing pipes, and there awaits sale, not at the volition of the Company, but at the volition of the consumer. The consumer is not required by contract or otherwise to use any of it. He may use it as freely as he will, and the contractual status of purchaser and seller only arises upon the commencement of such use.

The distinction in principle is, that in the one case commodities were brought in, in fulfillment of a previously made contract. In the other case, the gas is brought into the state for sale to those who may thereafter wish to purchase it. It is expected of course that sale of the gas will be had within New York State. However, there is no certainty as to when the sale will take place, or to whom it will be made. Except as its characteristics require, the importation and sale of this gas does not differ from the bringing into the state of a carload of cattle for sale generally to whoever may wish a portion thereof.

POINT IV

Regulation of the selling price of natural gas piped from one state to another is not of a character requiring uniform national legislation and hence is not within that class of cases where the states are prohibited from legislation, even though Congress has not acted.

There are certain classes of questions so national in their character that uniform national regulation is obviously essential, and in such instances, the states may not assume control of such matters, even though Congress has not acted.

This case, however, does not fall within that category. It is only within very narrow and restricted areas that na-

tural gas is produced at all. The large majority of the country is necessarily without it. The one company may have its source of supply close to its market, and be able to produce this commodity and deliver it to its consumers at much less than some other concern in a different locality. The sale of natural gas is essentially local in its character, as distinguished from national.

Such was the holding of the Supreme Court of Indiana in *Jamieson vs. Ind. Natural Gas and Oil Co.,* 128 Ind., 555, where the court said:

> "Upon this point, we affirm that natural gas is characteristically and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and its pecularities, it is a proper subject for state legislation, and cannot, so far as regards local production, be made the subject of general legislation by Congress; or, at all events, it does not require a uniform system as between the state, for its regulation."

And, in State ex rel Caster, et al vs. Flannelly, Kansas Supreme Court reported in Public Utilities Reports, Annot. 196 c. at page 810, it was said:

> "Granting for the moment that the sale of natural gas under the circumstances disclosed, is interstate commerce, it is not national in its character, it admits of no one uniform system of regulation, and it is not that kind of interstate commerce which requires exclusive legislation by Congress."

The Court of Appeals in its opinion, Page 51 of the Record said:

"The question remains whether, in default of action by Congress, the attempted regulation is within the police power of the state.

"The petitioner is a public service corporation. Its rates are subject to regulation by some agency of government. Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even the oil companies (Act to Regulate Commerce, as amended June 29, 1906, ch. 3591, and June 18, 1910, ch. 309). Gas and water companies are expressly excepted. In such circumstances, there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental (Leisy v. Hardin, supra; Minnesota Rate Cases, 230 U. S. 352, 396, 400). It must not discriminate against foreign products (Brimmer v. Rebman, 138 U. S. 78; Minn. Rate Cases, supra, at p. 401). It must not introduce diversity and conflict where there is need of uniformity and harmony (Cooley v. Board of Wardens, 12 How. (U. S.) 299, 319; Wabash, St. L. & P. R. Co. v. Ill., 118 U. S. 557; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204; Minn. Rate Cases, supra, at page 400) But subject to those conditions, the police power of the states survives, though the transactions brought within its grip are those of interstate commerce. Matters peculiarly of local concern are not "left to the unrestrained will of individuals because Congress has not acted" (Minn. Rate Cases, supra, at p. 402). "Our system of government is a practical adjustment by which the national authority as conferred by the Con-

stitution is maintained in its full scope without unnecessary loss of local efficiency" (Minn. Rate Cases, supra). No general formula can tell us in advance where the line is to be drawn. "We have no second Laplace, and we never shall have, with his Mechanique Politique, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision." (Daniel Webster in Bank of Augusta v. Earle, 13 Pet. 519, 559, quoted by Henderson, "The Position of Foreign Corporations in American Constitutional Law," p. 117).

POINT V

The delivery and sale of natural gas, after transportation from one state to another, is not interstate commerce.

The Defendants in Error understand that the Pennsylvania Gas Company places reliance upon that portion of the Court of Appeals opinion wherein the conclusion was reached that the local sale was a part of the interstate commerce. That court at page 51 of the record said:

> "There is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage has been reached. (Kehrer vs. Stewart, 197 U. S. 60, 65; Brown vs. Houston, 114 U. S. 622). The transactions would then be similar to those common in the

> oil business. We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end until the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say in the language of Holmes, J., in W. U. Tel. Co. vs. Foster, supra, that the transmission is "as continuous and rapid as science can make it."

In other words, the gas must be stored in reservoirs before interstate commerce ends.

This reasoning by the court does not seem to be the logical deduction to be drawn from the facts. It is obvious, that the act of bringing gas into the city is interstate commerce in the sense that it is bringing a commodity from one state to another. But, after its destination has been reached other problems arise, its transportation has ceased, the delivery and sale to consumers commences. Such sale is to those who may wish to use it in such quantities and at such times as they may desire.

The gas comes to the city of Jamestown through the company's main pipe lines. Its distribution and sale must necessarily be made through the system of local lines extending throughout the city. The overflow from the main

lines into the local system according to the pressure furnishes for all practical purposes a storage of the gas. The consumers may purchase of such gas, little or much or none at all. That which is unused awaits further consumption.

The delivery and sale of the gas to customers is made at the burner tips and can not be said to be a part of the continuous movement of the gas from the State of Pensylvania to consumers in Jamestown.

The reasons given by the court for such a finding are a departure from the well known views expressed by other courts. In State ex rel Caster vs. Flannelly, supra, it was expressly said:

> "It is a matter of common knowledge that service pipes from the pipe lines of distributing companies to private residences and other buildings belong to the owner of the property served, and installation was made at their expense."

Mr. Justice McReynolds in delivering the opinion in this court in Public Utilities Commission for the State of Kansas et al., vs. Landon, 249 U. S. page 236 said:

> "But in no sense can it be said under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constitute any part of interstate commerce. * * * * * * * * * * "

If the "original package rule" can be applied to delivery and sale of natural gas then under that rule the sale of gas within the state, after its transportation is completed, is not interstate commerce. This question was squarely presented in State ex rel vs. Flannelly, supra. In that instance, the Public Service Commission of the State of Kansas had

made an order regulating the selling price of gas furnished by the receiver of the gas company which procured a part at least of its supply outside the state. The receivers sought to restrain enforcement of the order upon the ground that they were engaged in interstate commerce and that the selling of such gas was a portion of such commerce. That court held that the selling of the gas after its transportation was not a part of interstate commerce and reached that result from the application of the so-called "original package rule" and in its discussion took occasion to say:

> "Our question is, when does the natural gas that is sold by the receivers in the several cities in this state, cease to be an article of interstate commerce."
>
> In 7 Enc. U. S. Sup. Ct. Rep. 298, we find a clear and condensed statement of the rules to be deduced from the decisions of the United States Supreme Court, as follows:
>
> "The general rule is, that as long as an article imported remains in the hands of the importer in the original and unbroken package in which it was imported, it is protected by the commerce clause of the Constitution from the interference of state laws, and that it is only when the package has been sold by the importer or has been broken up by him, or has otherwise become mixed with the common mass of property in the state, that it becomes subject to state legislation."
>
> "The original package rules will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Therefore the gas ceases to be an article of interstate

commerce. The gas when sold had become mixed with the common mass of the property in this state by being so commingled with the gas produced here as to completely lose its identity. * * * * * * * * * "

"If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of the property in the state. To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say: 'This came from another state, and has not yet become commingled with the mass of property in this state so as to make it a part of that property.' "

The leading authority upon the so-called "original package rule" is Company vs. Hardin, 135 U. S. 128. That case, when compared to the one at bar, upon the facts, is a strong authority to the effect that the sale of this gas as it is sold, is no part of interstate commerce.

In the Hardin case it was held that a manufacturer of beer, had a right to import it into a dry state, and there sell it in the original package. It is obvious that the same keg of beer so imported and sold by the glass, would not be within that protection.

POINT VI

State regulation of the selling price of gas piped in from another state is not a regulation of interstate commerce. It infringes no province of Congress. Is not a restriction upon interstate commerce in any sense and is an appropriate exercise of a purely state function.

The leading authority upon this question is Manufactures Light and Heat Co. vs. Ott, 215 Fed. 940. In that case, the Public Service Commission of the State of West Virginia, sought by order to regulate the price of gas charged to consumers within the state. Portions of that gas, at least, came from the State of Pennsylvania and Ohio, and it was insisted that the Commission had no authority by reason of the fact that the corporations affected were engaged in interstate commerce.

In discussing that question, that court said:

> "We are unable to agree that the fixing of the rates to be charged by complainants to their customers in West Virginia, is an unlawful regulation of interstate commerce. The regulation of companies engaged in the transportation of gas is expressly excluded from the scope of the interstate statute. Neither the West Virginia statute nor the orders of the Commission purport to interfere in any manner with the transportation of natural gas from West Virginia to other states. Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania in pumping gas into a common system of pipes supplying customers

in the three states, may produce the result that some gas from Ohio and Pennsylvania comes into West Virginia, although it is undisputed that a much larger quantity of gas goes out of West Virginia into Ohio and Pennsylvania than can possibly come in from these states. But this overflow of gas from one state to another, according to the pressure from the main gas pipes as common reservoirs, cannot effect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens. West vs. Kansas Gas Co. 221, U. S. 229, 31 Sup. Ct., 564, 55 L. Ed. 716, 34. L. R. A. (N. S.) 1193, relied on by complainants, has no application, for in the present case no effort is made to prevent the transportation and sale of natural gas from West Virginia into other states. It is not necessary to decide whether the Congress may not regulate charges for natural gas under such conditions, and under the well known rule the court should not anticipate that question. In the present state of the law, the Congress having taken no action, it was clearly within the power of the state legislature to provide for the protection of its own citizens against excessive charges. If it be assumed that interstate commerce will be incidentally affected, yet the regulation of the local charges of a natural gas company as a public service corporation is within the police power of the state until the Congress sees fit to act. The recent and full review of the subject by the Supreme Court in the Minnesota Rate Cases, Simpson vs. Shepard, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.), 1151, leaves no room for discussion. The statute falls clearly within the principles there laid down by the court after setting out the limitations on state action."

A like view was expressed by the Court of Appeals in this case on page 54 of the Record. That court said:

> "We deal here with a different situation. There is here no regulation of transportation (Mfrs'. Light & Heat Co. v. Ott, 215 Fed. Rep. 940, 944). There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service (Gibbs v. Baltimore Gas Co. supra.; New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650; Shepard v. Milwaukee Gas Co., 6 Wis. 639). The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is, therefore, the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters, protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local (Cooley v. Bd. of Port Wardens, supra.) It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved But even within the state, diversity rather than uniformity is

exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them.

"The case comes, then, to this: We have a sale of a single commodity. We have a pre-existing duty to sell it at fair rates. We have a transaction where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please (County of Mobile v. Kimball, supra; Transportation Co. v. Parkersburg, supra; Covington Bridge Case, supra p. 222). The local regulation stands until Congress occupies the field.

POINT VII

The logical result of appellant's argument, that the mere fact that the source of supply is outside the state brands the entire transaction as one of interstate commerce would be to remove all restraint upon those companies so situated geographically as to permit the obtaining of a part or all of the supply from without the state.

Analysis shows that the single fact in the present case, differentiating this company from those concededly under state control, is the location of the source of supply. It happens that in this instance that supply is within the State

of Pennsylvania. The gas is brought to Jamestown, and there sold, as called for. The business is transacted in the usual way that a gas business is carried on. It cannot be possible that the mere incident of the source of supply being without the state, subjects this helpless community to the unrestrained avarice of this public service corporation.

If it did, then a concern situated as is the Consolidated Gas Coompany of New York City, could well afford to move its plant from Long Island to Jersey City. It could as well pipe its gas across the Hudson as across the East River. It would then be in precisely the same situation as is the appellant. Even the great expense of such removal would soon be repaid, if the Consolidated Gas Company could then charge for its product such sums as it saw fit, without restraint by state authority.

In a like situation would be the electrical concerns along the Saint Lawrence and the Niagara Rivers. In fact along each border of the state would exist a geographical zone in which companies might operate, with complete immunity from all regulations.

Such a chaotic condition was never intended.

These situations clearly fall within the class of cases indicated by Justice Hughes in the Minnesota Rate Case, where he says:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state regulation from the foundation of the government, because of the late necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies,, hence the absence of regulation by Congress in

such matters has not implied that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supercede them."

POINT VIII

The case of Public Utilities Commission for the state of Kansas et al vs. Landon as Receiver, 249 U. S. 236, is decisive of the state's right to fix and determine the proper rate charged for gas sold to its inhabitants.

A brief recital of facts in the Landon litigation shows a somewhat dissimilar situation existing but an application of the principles hereinbefore indicated.

All of this litigation arose from the effort of the Public Service Commissions of the States of Kansas and Missouri to determine and fix the rates for gas sold within those states. There the same claim was made as in the case at bar, i. e. that the business of the gas company was interstate commerce and that the Commission had no jurisdiction over them. The decisions of the lower courts are found in 234 Fed. 152; 242 Fed. 682, and 245 Fed. 950.

The gas in those cases was produced in the states of Oklahoma and Kansas. The Oklahoma gas was piped into Kansas where prior to sale the gas produced in Kansas was added. Kansas City and other communities in Kansas were then served and the pipe lines continued into Missouri, where additional consumers were supplied. The Kansas Natural Gas Company of which Landon was receiver, owned the trunk lines and the gas, but the gas sold in Kansas was delivered to consumers through intermediate local distributing companies on a percentage basis. The gas was

consumed at the burner tips as fast as it passed through the meters of the individual consumers.

It appears that the gas supplied was transported for a long distance and that because of that fact one of the largest elements of operating expense was transportation charges. It further appears that in its decision the Public Service Commission then acting, attempted to make an analysis of the operating expenses and in connection therewith fixed a transportation charge which it took into account in fixing the selling price of the gas. The ultimate conclusion reached was that the selling price fixed upon that basis and that the figure there adopted under the facts in that case was a confiscatory charge necessarily involving a regulation of the transportation charges. Obviously if that conclusion of fact is correct, then there was an attempt to regulate interstate commerce.

The first Landon case was brought to restrain the Kansas Commission from enforcing a rate fixed by it. The Kansas State Court in People ex rel Caster vs. Flannelly, 96 Kans. 372, upheld the jurisdiction of the State Commission. The United States Circuit Court granted a preliminary injunction. (234 Federal 152). The case then came before Judge Booth. The opinions in both the Landon as Receiver vs. Public Utilities Commission of Kansas 242 Federal, 682, and in the companion case of Landon as Receiver vs. Missouri Commission 245 Fed. 950, were written by him. In the Kansas case (242 Federal 682) the court disregards the admixture of the local Kansas gas holding under the authorities that it did not change the interstate character of the business; that the delivery and sale, even through distributing companies, is a part of the interstate business and protected commerce and that the State of Kansas could not fix the rate of selling price of the gas.

Subsequently Judge Booth granted an injunction against the Missouri Commission 245 Fed. 950, on the ground that the Missouri Commission had not fixed rates but merely suspended schedules and threatened action. In his opinion Judge Booth reaffirmed his previous conclusion on the question of jurisdiction.

Upon final appeal to the United States Supreme Court (249 U. S. 236), the decrees of the lower courts in each instance were reversed.

The Supreme Court holds distinctly that the Commissions of the respective states of Missouri and Kansas had jurisdiction to fix the rates for the sale of such gas. The court in its opinion said:

> "We think the trial court properly overruled the objections offered to its jurisdiction and nothing need be added to the reasons which it gave. 234 Fed 152, 155. But we cannot agree with its conclusions that local companies in distributing and selling gas to their customers acted as mere agents, immediate representatives or instrumentalities of the receivers and as such carried on without interruption interstate commerce set in motion by them.
>
> "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such comerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. American Express Co. v. Iowa, 196 U. S. 133, 143, 25 Sup. Ct. 182, 49 L. Ed. 417; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; Haskell v. Kansas Natural Gas

Co., 224 U. S. 217, 32 Supt. Ct. 442, 56 L. Ed. 738.
* * * * * * * * *

"The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. * * "

There is no material distinction in the manner of delivery and sale in the Landon case from the one in this instance. In the former, the gas was sold by local distributing companies to local customers at the burner tips. In the present case there is no local distributing company but the gas is sold at the burner tips from the system of local mains at such times, in such quantities as the customers desire. There is no attempt to regulate the transportation of gas.

It does not follow then that the Public Service Commission of the State of New York upon an appropriate basis cannot regulate the selling price.

Unless the Public Service Commission has authority to proceed to investigate this matter of rates and fix the charges then concededly there is no other state authority.

The Interstate Commerce Commission acts have no application to this situation for the same expressly exclude the control of natural gas companies.

If then the Commission has no authority, there seems to

be no way in which any one can exercise the slightest control over this corporation.

If such is the law a most alarming condition is present. The thousands of consumers in the City of Jamestown depending upon this corporation for their fuel supply, must then submit to such tribute as the financial heads of this corporation may see fit to exact without basis founded upon values, cost of production or anything of substance other than the mere whim of that body of men. If this be true then there exists no power to require the gas company to supply gas or to prohibit it from charging a rate therefor which will make its use by the community prohibitive.

We submit that the decision in the Landon case is decisive and controlling upon the question of the Commission's jurisdiction.

CONCLUSION

The decision of the Court of Appeals proceeded upon the theory that a state regulation of the rates for gas to consumers from another state is a proper exercise of the police power of the state until Congress spoke on that subject.

The fallacy in that holding lies in the assumption that such distribution and sale is a part of the interstate commerce.

However, the court having correctly determined that the Public Service Commission of the State of New York has jurisdiction to fix the rates for gas sold within that State, this court will not disturb that holding, even though a wrong reason was adopted for such correct result.

Taylor vs. Thomas, 195 N. Y. 590, Affirmed 224 U. S. 73.

People ex rel White vs. Board of Aldermen, 157 N. Y. 431.

Ward vs. Hasbrouck, 169 N. Y. 407.

Trustees of East Hampton vs. Bowman, 136 N. Y. 521.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

LOUIS L. THRASHER,
Special Counsel for City of Jamestown,
Alfred C. Davis and Others,
Defendants in Error.

OPINION

PENNSYLVANIA GAS COMPANY *v.* PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 330. Argued December 8, 9, 1919.—Decided March 1, 1920.

The transmission and sale of natural gas, produced in one State and transported and furnished directly to consumers in a city of another State by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce (p. 28); but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates. P. 29. *Public Utilities Commission* v. *Landon*, 249 U. S. 236, distinguished.

225 N. Y. 397, affirmed.

THE case is stated in the opinion.

Mr. John E. Mullin, with whom *Mr. Marion H. Fisher* was on the briefs, for plaintiff in error:

The State has no power to regulate the rates in question, for such action necessarily imposes a direct burden and restraint upon interstate commerce.

The State in effect proposes to meet the plaintiff in error at the state line and to deny it freedom to import for sale a legitimate commodity of commerce except at a price to be fixed by the State. Nay more, the State apparently proposes not only to restrict the right of sale, but to compel the plaintiff in error to continue to import its Pennsylvania product for sale at the price fixed by the State. If such a regulation is not direct and substantial—if it does not restrain and burden interstate commerce, we can conceive of no action which would.

That a business is "regulated" when the return allowed on the business or the sale price of the commodity dealt in is fixed by governmental authority cannot be questioned, and such a regulation is far more substantial and burdensome than was the regulation of customers declared to be an unauthorized interference with commerce in the *Ticker Case*, 247 U. S. 105, or the inspection charge declared invalid by this court in *Western Oil Refg. Co.* v. *Lipscomb*, 244 U. S. 346. It is more direct than the state license fees upon agents selling and delivering interstate merchandise declared repugnant to the Constitution in *Stewart* v. *Michigan*, 232 U. S. 665; *Caldwell* v. *North Carolina*, 187 U. S. 622, and in *Rearick* v. *Pennsylvania*, 203 U. S. 507.

The rate or price received for the transportation and supply of the natural gas is the vital part of the transaction. Short of flat prohibition, there is no way to strike more directly at the heart of a commercial transaction than to fix the price that is to be received in it. See

Brown v. *Maryland*, 12 Wheat. 419, 447; *Leisy* v. *Hardin*, 135 U. S. 100, 108, 119–123; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 328, 329; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507; Judson on Interstate Commerce, § 17; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 255, 256.

The validity of state action does not rest upon the discretion or good judgment of the State, nor on the reasonableness of the regulation imposed. It depends solely on the question of power. *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Railroad Commission* v. *Worthington*, 225 U. S. 101, 107.

Federal functions may not be usurped under the police power, nor does the occupancy of highways by the plaintiff in error under local franchises authorize the State to regulate the price of gas moving in interstate commerce. *Leisy* v. *Hardin*, 135 U. S. 100, 108, 119–123; *Lyng* v. *Michigan*, 135 U. S. 161–166; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557.

Substantially parallel to the pipe line of the plaintiff in error, between the City of Warren, Pa., and the City of Jamestown, N. Y., an interurban trolley system is operated. This line is typical of many others, occupying city streets under local franchises. The State will hardly assert that it is able to regulate the interstate business or interstate rates of such trolley lines under the police power or because of the use of local franchises. The same rules and the same principles must be applied to the interstate business of the plaintiff in error.

This court has already held that the interstate gas business may not be regulated under the police power based on the use of highways. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229. See *Kansas Natural Gas Co.* v. *Haskell*, 172 Fed. Rep. 545.

The interstate natural gas business conducted by plaintiff in error is national, not local, in character, and the proposed state regulation thereof is not local in its operation. An interstate transaction requires national control whenever it is of such character that one State cannot control it without in effect extending its regulations into another State, or in effect assuming jurisdiction over property in another State, or leaving the transaction subject to conflicting regulations of different States.

The power of a State to enforce common-law duties, or like statutory duties, of public utilities engaged in interstate commerce does not extend to prescribing rates for interstate commerce. Subjecting interstate rates to control by a state commission is not the same as enforcing the common-law duty to serve at reasonable rates.

In fixing intrastate rates, for an interstate public utility, the State has no right to take into consideration the business of the company outside of the State, or base them on the value of the property outside the State. In fixing the gas rates in question, the State necessarily regulates the rate or return for the interstate transportation of the gas, and that is beyond its power.

Mr. Ledyard P. Hale for Public Service Commission, defendant in error.

Mr. Louis L. Thrasher for City of Jamestown *et al.*, defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This writ of error brings before us for consideration the question whether the Public Service Commission of the State of New York has the power to regulate rates at which natural gas shall be furnished by the Pennsylvania Gas Company, plaintiff in error, to consumers in the city of Jamestown in the State of New York. The Court of

Appeals of New York (225 N. Y. 397) held that the Commission had such authority.

The statute of the State of New York, § 65, Public Service Commission Law, Laws 1910, c. 480, provides: "Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

Consumers of gas, furnished by the plaintiff in error in the city of Jamestown, New York, filed a complaint demanding a reduction of gas rates in that city. The Public Service Commission asserted its jurisdiction which, as we have said, was sustained by the Court of Appeals of New York.

The federal question presented for our consideration involves the correctness of the contention of the plaintiff in error that the authority undertaken to be exercised by the Commission, and sustained by the court, was an attempt under state authority to regulate interstate commerce, and violative of the constitutional power granted to Congress over commerce among the States. The facts are undisputed. The plaintiff in error, the Pennsylvania Gas Company, is a corporation organized under the laws of the State of Pennsylvania and engaged in transmitting and selling natural gas in the State of New York and Pennsylvania. It transports the gas by pipe-lines about fifty miles in length from the source

of supply in the State of Pennsylvania into the State of New York. It sells and delivers gas to consumers in the city of Jamestown, in the town of Ellicott, and in the village of Falconer, all in Chautauqua County, New York. It also sells and delivers natural gas to consumers in the cities of Warren, Corry and Erie in Pennsylvania.

We think that the transmission and sale of natural gas produced in one State, transported by means of pipe-lines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West* v. *Kansas Natural Gas Co.* 221 U. S. 229; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105.

This case differs from *Public Utilities Commission* v. *Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation.

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and there-

fore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us.

The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

In dealing with interstate commerce it is not in some instances regarded as an infringment upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the *Minnesota Rate Cases*, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (p. 402): "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled

pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarily one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from federal control. C. 309, § 7, 36 Stat. 539, 544.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmis-